Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991 Petition for Declaratory Ruling Of The Fax Ban Coalition	CG Docket No. 02-278

COMMENTS OF THE ATTORNEYS GENERAL OF ARKANSAS, CALIFORNIA, CONNECTICUT, KENTUCKY, MARYLAND, NEW MEXICO, OKLAHOMA, VERMONT, WEST VIRGINIA, WISCONSIN

January 13, 2006

The undersigned Attorneys General submit this Comment in response to the petition filed by The Fax Ban Coalition (the "Petition") requesting declaratory rulings (1) that the Federal Communications Commission (the "Commission" or "FCC") has exclusive authority to regulate interstate "commercial fax messages," and (2) that section 17538.43 of the California Business and Professions Code, and all other State laws purporting to regulate "interstate facsimile transmissions," are preempted by the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. Sec. 227. By submitting this Comment, the Attorneys General expressly state that they are not waiving the sovereign immunity of their respective states, nor are they submitting themselves or their respective states to the jurisdiction of the Commission. Rather, the Attorneys General expressly assert their objections to the jurisdiction of the Commission to resolve the matters presented by the Petition and further assert their right to argue the merits of this dispute in the appropriate forum.

INTRODUCTION

In asking the Commission to preempt all State laws that purport to regulate "interstate fax communications" or "interstate commercial fax messages", the Petition mischaracterizes the State laws about which it complains and incorrectly assumes that Congress has conferred on the FCC exclusive regulatory jurisdiction over unsolicited advertisements sent interstate to a facsimile machine by persons or entities doing business in the particular State. Neither the challenged California statute nor the laws of the other states about which Petitioner complains regulate "interstate fax communications" or "interstate commercial fax messages." Instead, the States have adopted consumer protection legislation governing the sending of unsolicited fax advertisement. Neither the purpose nor the substance of these State laws makes them an appropriate target for a preemption determination by the Commission.

The determination of whether a statute is preemptive is properly addressed by the courts and not by the Commission. Moreover, neither the Communications Act of 1934 nor the TCPA authorizes the Commission to summarily sweep aside state junk fax laws. Congress has not intended, either expressly or inferentially, for the Commission to occupy the field of fax advertisement regulation. The California statute that is a particular focus of the Petition, section 17538.43 of the California Business and Professions Code, makes it unlawful for a person or entity to send an

advertisement to a fax machine without the recipient's prior express invitation or permission. The law only applies if the person or entity sending the fax, or the recipient, are located within California. Section 17538.43, like the other State laws challenged in the Petition, is, at its core, a consumer protection statute and is designed to defend the privacy of consumers and prevent the financial burden and intrusion that unsolicited fax advertisement inflicts on the recipient.

The federal Communications Act of 1934 preserves State regulation of the telecommunications industry and limits preemption only to those areas where the intent to preempt is express. There is no clear statement in the TCPA of express intent to preempt state law governing the sending of unsolicited fax advertisements by individuals or entities doing business in the state. That is not surprising, since consumer protection and privacy issues have long been within the province of the States' police powers. Instead, the TCPA contains an explicit savings clause that limits the circumstances in which a state law must give way to federal law. State junk fax laws fall squarely within the language of that savings clause.

Petitioner attempts to create the appearance of inconsistency and confusion by citing to the laws of various states, and painting it as a hardship for the senders of unsolicited fax advertisement to comply with state laws. Yet, businesses with a national scope daily face, and successfully manage, a "patchwork" of laws regarding taxes, libel, securities requirements, charitable registration requirements, franchises, tort and any number of other areas of regulation; and these regimes, in all their variety, stand despite the looming backdrop of federal regulatory authority (or of the dormant Commerce Clause, which Petitioner implicitly raises but cannot assert here). Compliance with state 'junk fax' laws is no different than compliance with other laws applicable to those doing business in a particular state. The TCPA does not create a special exemption for telemarketers, relieving them of the obligation to comply with such state laws.

Through its petition, the Fax Ban Coalition asks the Commission to confer power upon itself and intrude upon the States' exercise of their police powers. The sole purpose for that request is to allow telemarketers to evade state consumer protection laws. Such an imprudent request should be denied.

BACKGROUND

I. Federal Regulations

The TCPA amended the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment. [PL 102-243 (S 1462), 105 Stat 2394, at Exh. D. to Brief] The purposes of the bill, as described in the Senate Committee Report, "are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain users of facsimile (fax) machines and automatic dialers." [102 S. Rep. 178, 1991 U.S.C.C.A.N. 1968] New Section 227 made it unlawful for any person within the United States, among other things, "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." [47 U.S.C. 227(b)(1)(C)] The term "unsolicited advertisement" was defined to mean "any material advertising the commercial availability or quality of any property, goods, or services *which is transmitted to any person without that person's prior express invitation or permission*." [47 U.S.C. 227(a)(4) (emphasis added)]

The Telephone Consumer Protection Act of 1991 includes a savings clause:

> (1) STATE LAW NOT PREEMPTED.—Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, *nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits–*
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> (A) *the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements*;
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.

[47 U.S.C. 227(e)(1) (emphasis added)]

On July 25, 2003, the FCC issued implementing rules and regulations, which noted, "Congress determined that companies that wish to fax unsolicited advertisements to customers must obtain their express permission to do so before transmitting any faxes to them. *See* 47 U.S.C.(b)(1)(C) and (a)(4)." [Rules and Regulations Implementing the Telephone Consumer Protection Act of 1992 ("FCC Rules & Regs"), 68 Fed. Reg. 44144, 44168, para 134] Under the new rules proposed by the FCC, "the permission to send fax advertisements must be provided in

writing, include the recipient's signature and facsimile number, and cannot be in the form of a 'negative option.'" [*Id.*]

In August 2003, the FCC stayed until January 1, 2005, the effective date of the July 2003 implementing rules and regulations; the stay subsequently was extended through January 9, 2006. [68 Fed. Reg. 50,978; 70 Fed. Reg. 37,705]

The Junk Fax Prevention Act of 2005 (S. 714), approved July 9, 2005, eliminated the Commission's proposed rule that permission for sending unsolicited fax advertisements must be obtained in writing. The statute also permitted the transmission of such faxes by a sender with an established business relationship (EBR) with the recipient. The Junk Fax Prevention Act amended Section 227(a) of the Communications Act of 1934 to provide that the term "established business relationship" shall have the meaning given the term in 47 C.F.R. section 64.1200, as in effect on January 1, 2003, but without any time limitation set forth therein.[1/] [47 U.S.C. 227(a)(2), (a)(2)(B)]

The savings clause of the TCPA, set forth above, was incorporated unchanged into the Junk Fax Prevention Act of 2005. [47 U.S.C. 227(e)]

II. Regulation of Unsolicited Fax Advertising by California

California's legislative efforts to curb unsolicited fax advertisements are now in their second decade. In 1992, the California Legislature passed a bill that prohibited the sending of unsolicited fax advertisements unless the faxed document contained a toll-free telephone number and an address that the recipient could use to stop further advertisements [Assem. Bill No. 2438 (1991-1992 Reg. Sess.) sec. 1] The bill added section 17538.4 to the Business and Professions Code, which provided:

> (a) No person or entity *conducting business in this state* shall fax or cause to be faxed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that

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1. Accordingly, under the Junk Fax Prevention Act of 2005, "established business relationship" means "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity … or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity …, which relationship has not been previously terminated by either party." [47 C.F.R. 64.1200] The Act extended that definition to cover a relationship with a business subscriber as well as a residential subscriber. [47 U.S.C. 227(a)(2)(A)]

> person or entity establishes a toll-free telephone number which a recipient of the unsolicited faxed documents may call to notify the sender not to fax the recipient any further unsolicited documents. (emphasis added)

Under "Argument," the Enrolled Bill Report explained: "… We view unsolicited faxed ads as an invasion of privacy and an infringement on personal property. We know of no other advertising situation where the recipient is forced to bear a portion of the advertiser's costs." [Enrolled Bill Rep., *supra*, at p. 3] Section 17438.4's restrictions on unsolicited fax advertisements remained in effect until January 1, 2003. [*See* Historical and Statutory Notes, 5 West's Ann. Cal. Bus. & Prof. Code (2003 supp.) sec. 17538.4, pp. 101-103; Cal. Const., art. IV, Sec. 8, subd. (c).]

In 2005, the California Legislature again took up the issue of unsolicited advertising. On October 7, 2005, the Governor approved Senate Bill No. 833, adding section 17538.43 to the Business and Professions Code. The statute provides:

> (b)(1) It is unlawful for a person or entity, if either the person or entity or the recipient is located within California, to use any telephone facsimile machine, computer, or other device to send, or cause another person or entity to use such a device to send, an unsolicited advertisement to a telephone facsimile machine.
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> (2) In addition to any other remedy provided by law, including a remedy provided by the Telephone Consumer Act (47 U.S.C. Sec. 227 and following), a person or entity may bring an action for a violation of this subdivision seeking the following relief:
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> (A) Injunctive relief against further violations.
> (B) Actual damages or statutory damages of five hundred dollars ($500) per violation, whichever amount is greater.
> (C) Both injunctive relief and damages as set forth in subparagraphs (A) and (B).

[SB 833, attached at Appendix B to the Petition]

The statute defines "Unsolicited advertisement" to mean: "any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person or entity without that person's or entity's prior express invitation or permission. Prior express invitation or permission may be obtained for a specific or unlimited number of advertisements and may be obtained for a specific or unlimited period of time." [Bus. & Prof. Code sec. 17538.43(a)(2)]

The sponsor of Senate Bill 833, Senator Debra Bowen, explained the motivation for the regulation as follows:

> Unlike billboard, radio, TV, newspaper, magazine, or even junk mail – where the advertiser pays for the ad – junk faxes force each and every recipient to foot the bill by paying for the paper and toner used to print the ad on their fax machine. What's more, small businesses and

> self-employed people with limited resources and few telephone lines to their offices are also forced to bear the cost of having their business interrupted while their fax line is occupied receiving unsolicited fax advertisements. Companies that try to get off of junk fax lists face further productivity losses, as employees spend time calling junk fax senders in an attempt to get removed from junk fax lists.

[Backgrounder SB 833 (Bowen) Junk Faxing, attached hereto at Appendix A]

SB 883 was amended during the final days of the legislative session to provide an exception for faxes sent by or on behalf of a tax-exempt nonprofit professional or trade association to its members.

ARGUMENT

I. The Commission Lacks Authority To Preempt All State Consumer Protection Laws That Affect The Interstate Faxing Of Unsolicited Advertisement By Individuals Or Entities Doing Business in the State

Petitioner asks the Commission to "declare on a uniform and national basis that ... the Commission has exclusive jurisdiction to regulate interstate commercial fax messages and all State efforts to do so are preempted." [Petition, at 14] The Commission may not decide such a sweeping preemption issue both as a matter of law and of agency authority.

A. It Is For A Court, Not The Commission, To Decide Whether A Statute Is Preemptive

The declaration Petitioner seeks, that all State laws that "regulate interstate commercial fax messages" are preempted, would require the Commission to determine whether the TCPA is preemptive with respect to a multiplicity of state regulations, each of which demands a different analysis.[2/] Such a determination does not implicate the technical expertise of the Commission or require analysis of the meaning of substantive (as opposed to preemptive) provisions of the statute. Petitioner attempts to gloss over this issue by framing its declaratory request as involving a statement about the "jurisdiction" of the Commission. The actual issue raised by the Petition, however, is the Commission's authority to make the categorical preemption decision that Petitioner seeks.

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2. On its face, the declaration Petitioner seeks would appear to sweep up a host of state statutes and regulations that extend to those sending "commercial fax messages" into or out of the state, including but not limited to anti-harassment, unfair business practices, trade libel, privacy, trespass, false advertising and pornography laws.

As a matter of law, the Commission is not the proper entity to address the Petition. The question of *whether* a statute is preemptive is properly addressed by the courts and not by the Commission. *See, e.g. Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744, 116 S.Ct. 1730 (1996) (the question of whether a statute is pre-emptive "must always be decided *de novo* by the courts"); *BankWest, Inc. v. Baker,* 411 F.3d 1289, 1300 (11th Cir. 2005) ("we do not defer to agency positions, whether formal or informal, on preemption issues"). Because "'a preemption determination involves matters ... more within the expertise of the courts than within the expertise of' an administrative agency," the Commission should decline to issue the declaration regarding preemption that Petitioner seeks. *Id.*, at 1301.

The Commission also lacks agency authority to make the preemption determination Petitioner seeks, and should deny the Petition on that basis, as discussed below.

B. The Communications Act Does Not Authorize The Commission To Preempt State Consumer Protection Laws Governing Unsolicited Fax Advertisement

The express purpose of the Communications Act of 1934 is "to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges." 47 U.S.C.A. section 151. Nothing in the Communications Act provides the Commission the authority to categorically preempt state consumer protection laws governing unsolicited fax advertisement.

It is well-settled that the Commission may preempt state law only where congressional authorization provides the authority for it to do so. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Id.* The nature and scope of the authority granted to the agency, along with any limitations to that authority contained within the statute, cabins its power to act. *Id.* To survive scrutiny, an agency's choice to preempt must be a "reasonable accommodation of conflicting policies *that were committed to the agency's care* by the statute...." *United States v. Shimer*, 367 U.S. 374, 383 (1961) (emphasis added). An agency may not exceed its statutory authority or act arbitrarily in the exercise of its power. *Fidelity Fed. Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). In this

instance, no general or specific congressional authorization provides the Commission the authority to define the scope of its own jurisdiction or to declare that all state laws governing the sending of unsolicited fax advertisement by those doing business in the state are preempted.

Petitioner argues that the Commission can make a nationwide declaration of preemption based on its ability to regulate interstate telephone service. Referring to the general language of sections 151 and 152 of the Communications Act of 1934, and citing *Louisiana Public Service Commission*, Petitioner contends that the Commission has the ability to preempt State laws that interfere with areas in which the Commission's authority purportedly is exclusive. [Petition, at 16] But the holding of *Louisiana Public Service Commission* does not support the position Petitioner advocates.

Petitioner cites *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 360 (1986), for the proposition the Communications Act "divide[d] the world into two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction." [Petition, at 9] The actual statement by the Supreme Court is quite different:

> However, while the [1934 Communications] Act would ***seem*** to divide the world of domestic telephone service neatly into two hemispheres - one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction - in practice, ***the realities of technology and economics belie such a clean parceling of responsibility***.

Id. 476 U.S. at 360 (holding provision of Communications Act which deals specifically with depreciation charges did not require automatic preemption of all state regulation respecting depreciation)(emphasis added). The Supreme Court's acknowledgment of the realities *precluding* the razor-sharp regulatory distinction between interstate and intrastate communications that Petitioner asserts does not support Petitioner's attempt to imbue the Commission with expansive preemptive authority.

Section 152(b) of the Communications Act provides no shelter for Petitioner. Congress, in enacting the TCPA, amended section 2(b) of the Communications Act (47 U.S.C. 152(b)) so that it begins: "*Except as provided in sections 223 through 227*, inclusive, and subject to the provisions..." [PL 102-243, at (b) Conforming Amendment (emphasis added)] Petitioner thus

cannot use section 152(b) to somehow "trump" the language of the savings clause at section 227(e)(1), which, as discussed in part II.A. *infra*, expressly limits preemption.

Moreover, in discussing the responsibilities of the Commission and the States in *Louisiana Public Service Commission*, the Supreme Court was addressing interstate and intrastate telephone *service*, not acts taking place *using* that service which implicate consumer protection issues and the police powers of the States.[3/] The Commission historically is considered to have the authority to regulate the "instrumentalities and facilities used in the transmission and reception of interstate communications." *See, e.g. Orth-O-Vision, Inc. Petition for Declaratory Ruling*, 69 F.C.C.2d 657, 666 (1978); *City of New York v. F.C.C.*, 486 U.S. 57 (1988) (holding that FCC has jurisdiction to preempt laws regarding "technical standards" for provision of cable television services). Indeed, the TCPA recognizes the Commission's authority in this respect by specifically excepting technical and procedural standards from the preservation of state laws in the savings clause at section 227(e)(1). State regulation of the sending of unsolicited fax advertisement by those doing business in the State does not constitute regulation of rates, instrumentalities or facilities for communications services, or technical and procedural standards, and thus does not intrude upon the regulatory authority, or implicate the expertise, of the Commission.

Were it otherwise, states would not be able to penalize telephone harassment or threats made by telephone or deceptive trade practices committed over the telephone (among the traditional areas where states exercise police power authority), when calls cross state lines. An unsolicited fax

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3. Petitioner's citation to *Operator Services Providers of America Petition for Expedited Declaratory Ruling*, Mem. Op. & Order, 6 FCC Rcd. 4475 ("*OSPA*"), [Petition at 15], simply confirms this point. The Commission in *OSPA* concluded that the Communications Act precludes a State from regulating interstate calls to operator service providers – hardly surprising given the Commission's historic regulatory authority with respect to interstate telephone service. Moreover, even the Commission's regulatory authority over telephone service providers has diminished as a result of de-tariffing. *See, e.g., Wisconsin v. AT&T Corp.*, 217 F.Supp.2d 935, 938 (W.D.Wis. 2002) (remanding Attorney General's consumer protection claim against telecommunications provider to state court because "with the demise of filed tariffs ... complete preemption clearly no longer exists.... [T]here is not complete preemption by the FCA which would warrant the exercise of federal question jurisdiction").

advertisement that comes into California[4/] from another state and invades the privacy and seizes the fax equipment, paper and toner of a California resident, is as much the business of California as a car whose journey begins in another state but which causes injury in California or a threatening call made from another state to a California resident.

The California law about which Petitioner complains, section 17538.43 of the Business and Professions Code, is, at its core, a consumer protection statute designed to defend the privacy of consumers and prevent the financial burden and intrusion of unsolicited fax advertisement. Consumer protection and privacy issues have long been within the province of the States' police powers. Regulation of advertising, particularly in furtherance of consumer protection, is an area in which states have historically exercised their police powers. *Packer Corp. v. Utah*, 285 U.S. 105, 108 (1932); *Smiley v. Citibank*, 11 Cal.4th 138, 148 (1995); *accord Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 83 S.Ct. 1210, 1219 (1963). *See also Black v. Financial Freedom Senior Funding Corp.*, 92 Cal.App.4th 917, 926 (2001)("Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the states' police power, and are thus subject to this heightened presumption against preemption").

Individuals and entities sending unsolicited fax advertisement are as likely as other sellers of goods and services to sometimes act in the marketplace in ways that warrant consumer protection enforcement and state- and industry-specific regulation. The Commission has no authority to categorically preempt state laws governing the sending of unsolicited fax advertisement; and it certainly has no authority to intrude upon the States' exercise of their police powers to protect their residents with respect to those doing business in the state.

C. The TCPA Provides No Authority To The Commission To Preempt State Consumer Protection Laws Governing The Sending Of Unsolicited Fax Advertisement By Those Doing Business In The State

The Supreme Court has explicitly stated that "[a]n agency may not confer power on itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction

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4. This principle applies to every state, and not just to California.

would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." *Louisiana Public Service Comm'n,* 476 U.S. at 374. Far from providing the Commission with sweeping preemptive authority, the TCPA in fact limits the Commission's authority and discretion with respect to unsolicited fax advertisement.

The TCPA directed the FCC to issue implementing regulations, and gave particular instructions regarding artificial or prerecorded voice messages. [47 U.S.C. 227(b)(2)] In section 227(d)(2), Congress also specifically directed the Commission to "revise the regulations setting technical and procedural standards for telephone facsimile machines." The legislation included no suggestion that the Commission should consider exemptions for unsolicited fax advertisements. Indeed, as the Commission stated, "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the [junk fax] prohibition." [1992 TCPA Order, 7 Fcc Rcd 2736 at 8779, para. 54, n. 87] In the Junk Fax Prevention Act of 2005, Congress provided the Commission with certain, specified discretion with respect to fax advertisement. The Act added a new subparagraph (F) to section 227(b)(2) of the TCPA, giving the Commission the discretion to allow tax-exempt nonprofit professional or trade associations to send unsolicited advertisements to their members. The Junk Fax Prevention Act also added subparagraph (G)(i), which gives the Commission the authority to establish a time limit on the "established business relationship" exemption to the prohibition against the faxing of unsolicited advertisements to individuals without their prior express invitation or permission, and provides specific instructions regarding the factors the Commission is to consider and the timing of its deliberations.

The TCPA, as amended by the Junk Fax Prevention Act, thus specifically delineates the authority, and restrains the discretion, of the Commission with respect to fax advertisement. No provision in the TCPA gives the Commission the authority to preempt all State laws governing "interstate commercial fax messages" or suggests that Congress desired an expansive uniform regulatory scheme for "facsimile communications."

Petitioner repeatedly refers, without citation, to purported "efforts by Congress and the Commission to establish a uniform regulatory scheme for interstate commercial fax calls."

[Petition, at 15, 16, 17] Yet, nothing in the TCPA or Congressional reports relating thereto evidence such expansive intent. Senate Report 102-178 simply states that "[t]he purposes of the bill [S. 1462 (the TCPA)] are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." [102 S.Rpt. 178 (October 8, 1991)] In "Section 2. Findings," Congress made various statements regarding telemarketing and automated or prerecorded calls, but said nothing about unsolicited fax advertisement, let alone a "uniform regulatory scheme." [PL 102-243 (S 1462) (December 20, 1991), 105 Stat 2394] To the contrary, Senate Report 109-76 states, "[t]he bill [S. 714 (the Junk Fax Prevention Act)] would not affect the ability of states to establish stricter rules for the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements." [109 S.Rpt. 76 (June 7, 2005), at 12]

As evidenced by the statement of purpose in the Senate Report, and the name of the law itself, the TCPA is directed at consumer protection. *US Fax Law Center, Inc. v. IHire, Inc.*, 362 F.Supp.2d 1248, 1252 (D.Colo. 2005) ("eight federal district courts in nine decisions since August 2002 have found that the TCPA exists to protect privacy interests"). The FCC plainly does not have exclusive authority to regulate consumer protection, or to protect the privacy interests of telephone subscribers, or to prevent the trespass to facsimile equipment and taking of the recipient's ink and paper that is the inevitable result of unsolicited fax advertisement. The mere fact that there is an "interstate" element to a State consumer protection law that applies to those doing business in the state does not allow the Commission to aggrandize its regulatory authority and impede the States' ability to exercise their police powers.

II. Neither The Communications Act Of 1934 Nor The Telephone Consumer Protection Act Of 1991 Preempt State Consumer Protection Laws

Even if the Commission were to consider preemption issues despite its lack of authority to do so, there is no basis for preemption here.

When Congress has expressly codified its preemptive intent in statutory form, analysis "begins with the language of the statute." *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1303 (11th

Cir. 2005), quoting *Lorilland Tobacco Co. v. Reilly*, 533 U.S. 525, 542, 121 S.Ct. 2404, 2415 (2001). In addressing a federal statute that expressly preempts state law, the Supreme Court noted that "our interpretation of [the preemptive] language does not occur in a contextual vacuum. Rather, that interpretation is informed by two presumptions about the nature of pre-emption." *Id.*, at 1303, citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-485, 116 S.Ct. 2240, 2250 (1996).

"First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law.... In such situations it is important to give the statute a narrow construction in order to be consistent with both federalism concerns and the historic primacy of state regulation." *Id.*, quoting *Medtronic, supra*, and citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 112 S.Ct. 2608, 2618 (1992).

Second, "any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*." *Id.,* at 1304 (emphasis in original). The structure and purpose of the statute as a whole also is relevant, including an "understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.,* at 1304, citing *Medtronic* 518 U.S. at 485-85, 116 S.Ct. at 2250-51.

Finally, preemption analysis is based "on the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 2617 (1992), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 2250 (1996). As the Supreme Court has recognized, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 365-366, 109 S.Ct. 2506, 2517 (1989); *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). Because of the importance of this area to the States, "federal preemption of state

regulation in the area of telecommunications must be clear and occurs only in limited circumstances." *Communications Telesystems Int. v. California Public Utility Commission,* 196 F.3d 1011, 1017 (9th Cir. 1999), citing *Louisiana Pub. Serv. Com'n v. FCC,* 476 U.S. 355, 368-69, 106 S.Ct. 1890 (1986).

Applying these principles, it is apparent there is no "clear and manifest" Congressional intent to preempt state law governing the sending of unsolicited fax advertisements by individuals or entities doing business in California or any other State.

A. The TCPA Includes A Savings Clause That Limits Preemption

The TCPA includes a savings clause, which was incorporated without revision into the Junk Fax Prevention Act of 2005. The clause states:

> (1) STATE LAW NOT PREEMPTED.—Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, *nothing in this section or in the regulations prescribed under this section shall preempt any State law* that imposes more restrictive intrastate requirements or regulations on, or *which prohibits*—
>
> (A) *the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements*;
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.

[47 U.S.C. 227(e)(1) (emphasis added)]

The first clause of section 227(e)(1) – "Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection" -- expressly preempts state law with respect to technical and procedural standards, which are governed by subsection (2)(d) of section 227. The language of section 227(e)(1) that follows the first clause "does not preempt and it does not forbid. Just the opposite. It limits the circumstances in which a state law must give way to federal law." *Cellular Telecommunications Industry Assoc. v. FCC,* 168 F.3d 1332, 1335 (D.C.Cir. 1999).

Petitioner, eager to find complete preemption of any state law that touches on interstate commerce, ignores the disjunctive structure of the language that follows the initial express preemption of state law governing technical and procedural standards: "*nothing in this section or in the regulations prescribed under this section shall preempt any State law* that imposes more restrictive intrastate requirements or regulations on, or *which prohibits*...." The word "intrastate"

modifies "requirements or regulations." The word "which" in the phrase "or which prohibits" refers to the phrase "any State law." The phrase "any State law" is the only grammatically correct reference for the word "which." *See Glass v. Kemper Corporation*, 920 F.Supp. 928, 931 (N.D.Ill. 1996) (interpreting a statute specifically in its grammatically correct form). As the statute is structured, express non-preemption applies to two categories of state laws: those "that impose ... more restrictive intrastate requirements ... on" and those "which prohibit" the specific activities listed in sub-parts (A)-(D).

The disjunctive structure of the savings clause serves to make clear that federal law (1) does not preempt more restrictive intrastate requirements or regulations, and (2) by permitting states to prohibit the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements and other specified invasive activities, does not intrude upon the states' historic ability to exercise their police powers to protect consumers and privacy. *See Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (holding that non-preemption provision of the TCPA "makes it clear that Congress did not intend to 'occupy the field' of ADAD regulation....") (internal citation omitted). By referring to "interstate fax communications" and "interstate commercial fax messages," Petitioner attempts to divert attention from the fact that State "junk fax" laws fall squarely within the language of the savings clause: they simply "prohibit[] the use of telephone facsimile machines or other devices to send unsolicited advertisements" by those doing business in the State, as permitted by section 227(d)(1).

The express non-preemption language in section 227(e)(1) should end any discussion over whether Congress intended to supersede the right of California, or any other state, to prohibit a person or entity from using a fax machine, computer or other device to send an unsolicited advertisement to a fax machine, if either the person or entity or the recipient is located within the state.

B. Petitioner Cannot Circumvent The Express Non-Preemption Language In The Savings Clause

Petitioner suggests that Congress's "silence" in not including reference to "interstate" in section 227(e)(1), the savings clause, somehow should be construed as impliedly preempting

state laws that impact the interstate transmission of unsolicited advertisement. [Petition, at 12] But "silence on the part of Congress alone is not only insufficient to demonstrate field preemption, it actually weighs in favor of holding that it was the intent of Congress *not* to occupy the field." *Frank Bros., Inc. v. Wisconsin Dept. of Transportation,* 409 F.3d 880, 891 (7th Cir. 2005) (emphasis in original). *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 616, 117 S.Ct. 1590 (1997) (holding that "even where Congress has legislated in an area subject to its authority, our pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as preempting state law").

No more persuasive is Petitioner's reliance on selected comments from legislative history as a guide to statutory interpretation. "[N]either the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) nor Executive statements and letters addressed to congressional committees, nor the nonenactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 390 (2000) (Scalia, J., concurring) (internal footnote omitted).

Moreover, in determining a statute's meaning, legislative history, including committee reports, cannot override the actual text of the statute. *See, e.g., Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) (rejecting use of legislative history because "[w]hen the words of a statute are unambiguous ... 'judicial inquiry is complete.'"), quoting *Rubin v. United States,* 449 U.S. 424, 430 (1981); *Carter v. United States,* 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by examining the text [citation omitted], not by 'psychoanalyzing those who enacted it.'"), quoting *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment). Yet, that is exactly how Petitioner attempts to use general floor statements concerning the TCPA – to override the plain meaning of the text of 47 U.S.C. section 227(e)(1), which expressly forecloses the sweeping declaration of preemption Petitioner seeks by limiting the circumstances in which a state law must give way to federal law.

The Commission has stated that the savings clause, section 227(e)(1), is "ambiguous ... as to whether this prohibition applies both to intrastate and interstate calls...." [FCC Rules & Regs, 68 Fed. Reg. 44144, 44155, para 60][5/] Petitioner notes the FCC's view, but dismisses it as "plain error" [Petition, at 12], rather than acknowledging what it must: the language of the TCPA does not provide a clear statement of express preemption of State law governing interstate use of telephone facsimile machines or other electronic devices to send unsolicited advertisements. In such circumstances, it must be assumed that Congress intended to preserve local authority. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47, 83 S.Ct. 1210 (1963) ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute ... in the absence of an unambiguous congressional mandate to that effect"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533, 112 S.Ct. 2608 (1992) (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part) ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously.... We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language" (emphasis deleted)); *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) ("to give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* [*v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)] relied to

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5. The Commission stated: "pursuant to 47 U.S.C. 227(e)(1), we recognize that states may adopt more restrictive do-no-call laws governing intrastate telemarketing. With limited exceptions, the TCPA specifically prohibits the preemption of any state law that imposes more restrictive intrastate requirements or regulations. Section 227(e)(1) further limits the Commissions' ability to preempt any state law that prohibits certain telemarketing activities, including the making of telephone solicitations. *This provision is ambiguous, however, as to whether this prohibition applies both to intrastate and interstate calls, and is silent on the issue of whether state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted*. We caution that more restrictive state efforts to regulate interstate calling would almost certainly conflict with our rules." [68 Fed. Reg. 44144, 44155, para 60 (emphasis added)] This statement is part of the same document in which the Commission issued its rule that prior express invitation or permission of the recipient before transmitting an unsolicited fax advertisement must be in writing, a requirement not found in the California statute. [*Id.*, para 130]

protect states' interests.").

III. State Junk Fax Laws Are Not Implicitly Preempted

The preemptive scope of the TCPA is governed entirely by the express language of the savings clause, section 227(e)(1). "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority, ... there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2618 (1992) (citations omitted). Petitioner urges the Commission to make a broad declaration preempting all state laws regulating "interstate commercial fax messages" or "interstate fax communications" based on principles of implied preemption. But implied preemption analysis, i.e. inquiring whether Congress intended federal law to occupy a field exclusively or whether state law actually conflicts with federal law, provides no basis for the sweeping regulatory preemption Petitioner seeks.

A. The Communications Act Preserves State Authority

Federal law neither expressly preempts all state regulation, nor occupies the field of telecommunications regulation. In the Communications Act, as amended, in addition to the statutory provisions discussed above, Congress carefully crafted multiple savings clauses and sections that expressly authorize state regulation and limit preemption. Section 253(b), for example, confirms state authority to safeguard the rights of consumers. [47 U.S.C. 253(b) ("Nothing in this section [governing state regulatory authority] shall affect the ability of a State to impose ... requirements necessary to ... protect the public safety and welfare ... and safeguard the rights of consumers."] *See also Ting v. AT&T,* 319 F.3d 1126, 1137 (9th Cir. 2003) (the Act's regime based on market competition "depends in part on state law for the protection of consumers in the deregulated and competitive marketplace. This dependence creates a complimentary role between federal and state law under the 1996 Act."). Indeed, the Commission has concluded that section 252 of the Communications Act gives states authority to

regulate both interstate and intrastate matters. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report & Order, 11 FCC Rcd. 15,499, para. 84 (1996), *vacated in part on other grounds, Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *rev'd in part,* 525 U.S. 366, 119 S.Ct. 721 (1999).

Section 332(c)(3)(A) authorizes states to establish terms and conditions for wireless services, other than those that directly regulate rates or market entry. [47 U.S.C. 332(c)(3)(A)] And, section 601(c) of the Telecommunications Act of 1996 provides a savings clause that states, "This Act ... shall not be construed to modify, impair or supersede ... State ... law unless expressly so provided." [Pub. L. No. 104-104, section 601(c)(1), 110 Stat. 143 (1996), *reprinted in* note to 47 U.S.C. 152] Section 414 of the Communications Act further provides: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." [47 U.S.C. 414] *See also Pinney v. Nokia, Inc.,* 402 F.3d 430 (4th Cir. 2005), citing *Smith v. GTE Corp.,* 236 F.3d 1292, 1313 (11th Cir. 2001)(Sec. 414 counsels against a determination that the FCA completely preempts telecommunications' customers' claims against providers' fraudulent conduct in leasing telephones and related equipment); *Minnesota v. WorldCom, Inc.,* 125 F.Supp.2d 365, 372 (D.Minn. 2000) (permitting lawsuit by state attorneys general for state-law false advertising as applied to promotion of interstate long distance services because "WorldCom has not identified any provision of the FCA demonstrating that Congress intended to regulate the advertisement of interstate long distance telephone services").

These various statutory provisions, including the savings clause at section 227(e)(1) discussed above, manifest a longstanding congressional intention to preserve State regulation of the telecommunications industry, and to limit preemption.

B. State Consumer Protection Laws Governing Unsolicited Fax Advertisement Do Not Conflict With The TCPA

Absent an explicit indication by Congress of an intent to preempt state law, a state statute is preempted only "'where compliance with both federal and state regulations is a physical impossibility...,' or where the state 'law stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress.'" *CTS Corp. v. Dynamics Corporation of America,* 481 U.S. 69, 78-79, 107 S.Ct. 1637, 1644 (1987). Petitioner, however, asks the Commission to abandon its current conflict preemption approach [FCC Rules & Regs, 68 FR 44144, para 62 ("We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis.")] and instead to categorically preempt state laws. [Petition, at 14 ("The Commission must revise its approach and declare on a uniform and national basis that ... State efforts [to regulate interstate commercial fax messages] are preempted.")] Perhaps forgetful of that request, Petitioner nonetheless raises what could be construed as "conflict" arguments.

There is no basis for making any conflict argument here, however, because the TCPA expressly allows state regulation, and limits the scope of preemption.

Even if Petitioner's purported arguments are considered, they are meritless. With respect to the California statute, Petitioner complains that it does not contain the "established business relationship" exception, which was added to the TCPA by the Junk Fax Prevention Act of 2005. But that variance does not constitute a "conflict" sufficient to support a finding of implied preemption. *See, e.g., Van Bergen v. State of Minnesota,* 59 F.3d 1541 (8th Cir. 1995) (finding an individual able to comply both with the Minnesota statute which regulated automatic dialing-announcing devices but exempted callers with a prior personal or business relationship, and with the TCPA, which exempted only emergency calls); *Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, L.P.,* 329 F.Supp.2d 789 (M.D.La. 2004) (allowing receivers of unsolicited facsimile advertisements to sue advertisers and broadcasters under the TCPA and the Louisiana Unsolicited Telefacsimile Messages Act, even though the state law contained an EBR exception but the TCPA then did not). With respect to other state laws, Petitioner does not describe any specific conflict between the state law and the TCPA. The abstract nature of Petitioner's argument renders it meaningless, and simply highlights the illogic of asking the Commission to abandon its "case-by-case" approach.

Petitioner does not even argue that it would be physically impossible to comply with both

state and federal laws,[6/] returning instead to the conclusory assertions that "interstate communications are totally entrusted to the FCC" and "states do not have jurisdiction over interstate calls." [Petition, at 18] That argument, as discussed above, provides no basis for the Commission to issue the sweeping declaration of preemption that Petitioner seeks.

Petitioner's argument that state junk fax laws conflict with "federal goals" is simply mistaken. As discussed above, there is no indication in the TCPA, as amended by the Junk Fax Prevention Act, that Congress intended to "promote a uniform regulatory scheme" for unsolicited fax advertisements in particular, or for "fax transmissions" in general.[7/]

Petitioner is left with complaining that "because each State imposes different requirements for interstate faxes, business and associations face different challenge [sic] working on a national scale to be in full compliance with each and every provision." [Petition, at 19] This argument fails for several reasons. First, Petitioner essentially is asking the Commission to resolve a claim that state laws violate the dormant Commerce Clause – a determination outside the Commission's expertise or authority – without meeting the legal standards applicable to that claim at all, let alone specifically for each state law Petitioner purports to challenge. "For a state statute to run afoul of the dormant Commerce Clause, it must, at a minimum, impose a burden on

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6. In fact, with respect to the California statute, it is possible to comply with both laws simply by following the California law. Where "it is possible to comply with both federal and state law, there is neither a conflict nor a frustrated purpose." *Bravman v. Baxter Healthcare Corp.*, 842 F.Supp. 747, 753 (S.D.N.Y. 1994); *Ginochio v. Surgikos,Inc.* 864 F.Supp. 948, 951 (N.D.Cal. 1994).

7. Petitioner cannot argue that the California statute undermines Congress's actual purposes in the TCPA. Both the TCPA and the California law require "prior express invitation or permission" before sending an unsolicited advertisement by fax. Congress enacted the Junk Fax Prevention Act of 2005 to address a particular issue: the FCC's inclusion in regulations originally slated to take effect in July 2005 of a requirement that a recipient's "express invitation or permission" be obtained in writing. [18 FCC Rcd 14014 (2003); Senate Report on S. 714, p. 4-5] Instead, Congress presumed the existence of an established business relationship evidenced permission to send fax advertisements and created a limited statutory exception to the general prohibition against sending unsolicited advertisements. The California statute does not contain the requirement of written permission that Congress set out to address in the Junk Fax Prevention Act. Congress also indicated concern about the burden on trade associations and other non-profits, if they had to collect signatures from each member in order to send an unsolicited fax advertisement. [Senate Report on S.714, p. 9] The California Legislature specifically addressed the concerns of non-profit professional and trade associations by amending SB 833 to add an exemption at section 17538.34(d).

interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *National Electrical Manufacturers Assoc. v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001). Petitioner has not, and cannot, show that California's junk fax law creates any such unequal burden. Petitioner presumably also cannot make that requisite showing for any of the other state laws it asks the Commission to sweep aside.

Second, businesses with a national scope daily face, and successfully manage, a "patchwork" of laws on a host of subjects. Compliance with state laws governing unsolicited fax advertisement is no different than compliance with other laws applicable to those doing business in a particular state. A sender of unsolicited fax advertisement is required to conform to the laws of its recipient's jurisdiction -- just as direct mail marketers, mail order firms, and radio and television advertisers must conform their operations to a wide variety of legal regimes. The businesses included on Petitioner's impressive list of members clearly have the experience and the resources to comprehend and comply with both federal and state laws.[8/]

Third, where, as here, Congress has expressly permitted the States to perform certain functions, the "dormant" aspect of the Commerce Clause does not add an additional hurdle that must be cleared. And, finally, even if the Commerce Clause were applicable, it would not provide a basis for the Commission to categorically preempt State laws governing unsolicited fax advertisement.

IV. California, Like Every Other State, May Regulate Those Doing Business In The State Pursuant To Its Police Powers

Petitioner concedes that the States may issue regulations governing intrastate transmission of faxes. A California person or entity sending a fax to a California recipient thus is

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8. Petitioner's complaint that businesses cannot comply with state laws because "many fax numbers are "800" numbers" [Petition, at 14] is hardly credible, given electronic sorting capabilities and the commercial relevance of location-specific advertising. Federal law, in any event, prohibits using automatic dialing systems to place a call "[t]o ... any service for which the called party is charged for the call." [47 C.F.R. 64.1200(a)(1)(iii). Unless the members of the Fax Ban Coalition are dialing each "800" number by hand, there should be no unsolicited faxes sent to "800" numbers.

subject to Business and Professions Code section 17538.43 without objection.[9/] Petitioner's only complaint is that the California law applies to a California person or entity sending an unsolicited fax advertisement to a non-California resident, and to a person or entity outside the state sending such a fax to a California resident, i.e. the law applies to those doing business in California. Petitioner apparently believes that the senders of fax advertisements should be relieved of the obligation to follow any state laws, except for the law of the state in which the sender is domiciled with respect to faxes sent within that state.

Such a notion was dispelled years ago by the long history of dual regulation of communications technologies, *see e.g. Utility Reform Network v. California Public Utilities Comm'n,* 26 F.Supp.2d 1208, 1213 (N.D.Cal. 1997) ("California clearly has the authority to adopt regulations concerning the manner in which telecommunications carriers should contribute to the provision of universal services"), and established precedent that individuals and entities are subject to the laws of the states in which they do business. *Cormetrics, Inc. v. Atomic Park.com LLC,* 370 F.Supp.2d 1013 (N.D.Cal. 2005) (finding general jurisdiction over Internet marketing analyst that was an online retailer, made sales to California consumers, and advertised its services over the Internet). *See also Cellular Telecommunications Industry Assoc. v. FCC,* 168 F.3d 1332 (D.C.Cir. 1999) (Texas statute requiring telecommunications service providers doing business in the state to contribute annually to two state-run universal service programs not preempted by Communications Act).

The language of section 17538.34, "if either the person or entity or the recipient is located within California," simply clarifies what it means to be "conducting business in this state," as set forth in the earlier section 17538.4 governing the sending of unsolicited fax advertisements. States, including California, historically have enforced state laws, including telemarketing laws, within, as well as across, state lines pursuant to "long-arm" statutes. *American Telephone & Telegraph Co. v. MCI Communications,* 736 F.Supp. 1294, 1304 (D.N.J.

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9. This discussion focuses on California since its new "junk fax" law is given particular prominence in the Petition. The principles discussed herein apply to all States, however.

1990) (telemarketer that directed 2% of more than 75 million calls into state was subject to state law claims); *West Corporation v. Superior Court*, 116 Cal.App.4th 1167, 1176, 11 Cal.Rptr.3d 145 (2004) (telemarketers who 'upsell' a product to California residents have availed themselves of privilege of conducting activities within California). As the Commission has acknowledged, such state action is protected under TCPA section 227(f)(6), which provides that "[n]othing contained in this section shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State." [47 U.S.C. 227(f)(6); FCC Rules & Regs, 68 Fed. Reg. 44144, 44154, para 63 (noting that state "long-arm" statutes may be protected under section 227(f)(6) and stating "Nothing that we do in this order prohibits states from enforcing state regulations that are consistent with the TCPA and the rules established under this order in state court.")]

California, like every state, has a substantial governmental interest in protecting the privacy of consumers from encroachment, particularly in their homes, where much of the unsolicited fax advertisements are received. The ability of the government to protect "'the well-being, tranquility, and privacy of the home,'" is beyond question. *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S.Ct. 2495 (1988); *Joffe v. Acacia Mortgage Corp.*, 121 P.3d 831, 842 (Ariz.Ct.App. 2005) ("in protecting the privacy of cellular telephone subscribers from automated calls, the TCPA serves a significant governmental interest."). As the Supreme Court explained nearly two decades ago, "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Frisby, supra*, at 484-485, citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-749, 98 S.Ct. 3026, 3039-3040 (1978) (offensive radio broadcasts); *Rowan v. Post Office Dept.*, 397 U.S. 728, 738, 90 S.Ct. 1484, 1491 (1970) (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, 86-87, 69 S.Ct. 448, 453-54 (1949) (sound trucks). "An unwanted fax is the paradigmatic private nuisance." *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 642 (4th Cir. 2005).

California, like every state, also has a "legitimate and compelling interest in preserving a

business climate free of fraud and deceptive practices." *West Corporation v. Superior Court,* 116 Cal.App.4th 1167, 1180 (2004), quoting *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal.4th 1036, 1064, 80 Cal.Rptr.2d (1999). The sending of unsolicited fax advertisements is an inherently unfair and deceptive act or practice, since the advertiser is using someone else's fax equipment, paper, ink and supplies to print its advertisements without prior express consent to do so. *Memiola v. XYZ Corporation,* 126 Ohio Misc.2d 68, 802 N.E.2d 745, 749 (2003).

In *Diamond Multimedia Systems,* the court upheld the civil remedy provided in section 25500 of the California Corporations Code that is available to both in-state and out-of-state purchasers or sellers of securities whose price has been affected by the unlawful market manipulation proscribed by Corp. Code Section 25400. California, the court explained, has a "clear and substantial interest in preventing fraudulent practices in this state which may have an effect both in California and throughout the country." 19 Cal.4th at 1063. Moreover, "[e]ven if California had no interest in protecting investors in other states, the Legislature may reasonably conclude that California does have a legitimate interest in discouraging unlawful conduct that has a potential to harm California investors as well as persons in other states." *Id.* The same reasoning applies to California's new law prohibiting the sending of unsolicited advertisements by fax, if either the person or entity or the recipient is located within California, as set forth in section 17538.43(b)(1). California has a clear and substantial interest in discouraging unfair and deceptive practices that intrude upon the privacy rights of, and cause economic injury to, California residents as well as persons in other states impacted by unlawful conduct in California. To argue that California cannot prohibit an out-of-state company from faxing unsolicited advertisements to a California recipient simply because the out-of-state company sends the fax "interstate" essentially ignores the fact that the company is doing business in California, and gives it an immunity to which it is not entitled. Section 17538.43 is designed to protect California residents and to preserve a business climate free of fraud and deceptive practices. Thus, even if the Commerce Clause were applicable here, it provides no obstacle to the California law (or to any similar junk fax law of other states), as any incidental burden on

interstate commerce is not "clearly excessive" in relation to the local benefit. *People v. Hsu*, 82 Cal.App.4th, 976, 983, 99 Cal.Rptr.2d 184 (2000) ("The Internet is undeniably an incident of interstate commerce, but the fact that communication thereby can affect interstate commerce does not automatically cause a state statute in which Internet use is an element to burden interstate commerce.").

CONCLUSION

The mere fact that state consumer protection laws governing unsolicited fax advertisement apply to those doing business in the state, and for that reason may have an "interstate" aspect if the unsolicited fax advertisement is sent to a state resident by an individual or entity in another state (or vice versa), does not permit the Commission to expand its power in the face of Congressional limitations on its authority and on the scope of preemption.

We respectfully request that the Commission decline to consider the Petition because it is beyond the scope of the Commission's authority and expertise. Should the Commission choose to consider the Petition, it should decline to categorically preempt all state laws governing unsolicited fax advertisement and deny the Fax Ban Coalition's request for declaratory rulings.

Respectfully submitted,

/s/ Mike Beebe Mike Beebe Attorney General of Arkansas	/s/ Patricia Madrid Patricia Madrid Attorney General of New Mexico
/s/ Bill Lockyer Bill Lockyer Attorney General of California	/s/ W. A. Drew Edmondson W. A. Drew Edmondson Attorney General of Oklahoma
/s/ Richard Blumenthal Richard Blumenthal Attorney General of Connecticut	/s/ William H. Sorrell William H. Sorrell Attorney General of Vermont
/s/ Gregory D. Stumbo Gregory D. Stumbo Attorney General of Kentucky	/s/ Darrell V. McGraw, Jr. Darrell V. McGraw, Jr. Attorney General of West Virginia
/s/ J. Joseph Curran, Jr. J. Joseph Curran, Jr. Attorney General of Maryland	/s/ Peg A. Lautenschlager Peg A. Lautenschlager Attorney General of Wisconsin

Dated: January 13, 2006

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EXHIBIT A

STATE CAPITOL
SACRAMENTO, CA 95814-4900
(916) 651-4028

2512 ARTESIA BLVD.
SUITE 200
REDONDO BEACH, CA 90278
(310) 318-6994

E-MAIL:
SENATOR.BOWEN@SEN.CA.GOV

California State Senate

SENATOR
DEBRA BOWEN
TWENTY-EIGHTH SENATORIAL DISTRICT

REPRESENTING THE COMMUNITIES OF
CARSON, CHEVIOT HILLS, DEL AIRE, EL SEGUNDO, HARBOR CITY, HARBOR GATEWAY, HERMOSA BEACH, LENNOX, LOMITA, LONG BEACH, MANHATTAN BEACH, MARINA DEL REY, MAR VISTA, PALMS, PLAYA DEL REY, RANCHO PARK, REDONDO BEACH, SAN PEDRO, TORRANCE, VENICE, WESTCHESTER, WEST LOS ANGELES AND WILMINGTON.

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REVENUE & TAXATION
RULES

Backgrounder
SB 833 (Bowen) Junk Faxing

BACKGROUND

Up to July 2005, federal law banned sending advertisements to home and office fax machines unless the sender had "prior express invitation or permission" from the person on the receiving end. The federal junk fax ban was in place since 1992, and was enforced successfully by California and other state Attorneys General, the Federal Communications Commission (FCC), and through numerous individual lawsuits against junk faxers. In fact, in October 2004, in a case seeking more than $15 million in penalties on behalf of Californians who've been bombarded by junk faxes, California Attorney General Bill Lockyer obtained a federal court injunction against Fax.com, Inc. of Orange County. In 2004, the FCC issued 38 orders citing companies that advertise via junk faxing and companies that broadcast junk faxes for other businesses. Among those 2004 citations was a $5.4 million fine against Fax.com for repeated violations of the federal junk fax ban. Congress originally passed and then-President George H. Bush enacted a ban on sending unsolicited fax ads in 1991 as part of the Telephone Consumer Protection Act (TCPA).

S. 714 (Smith)

Dubbed the "Junk Fax Prevention Act of 2005," S. 714 by Senator Gordon Smith (R-Oregon), which President Bush signed into law in July 2005, gives any business from whom you have *ever* bought or simply shopped for a product or service the right to send you unsolicited junk fax ads. S. 714 gives junk fax outfits, such as Fax.com, the ability to broadcast millions of junk faxes a day and simply claim the recipients had called and asked for the information or had bought something from the advertiser in the past. There's no requirement in S. 714 for businesses to demonstrate a business relationship actually ever existed. S. 714 guts the federal junk fax ban in favor of an opt-out scheme whereby junk faxers include an "opt-out" number on the fax people must use to ask each advertiser to stop faxing them. Attempting to opt-out of junk faxes has proven over years to be as futile as attempting to opt-out of email spam.

Unlike billboard, radio, TV, newspaper, magazine, or even junk mail – where the advertiser pays for the ad – junk faxes force each and every recipient to foot the bill by paying for the paper and toner used to print the ad on their fax machine. What's more, small businesses and self-employed people with limited resources and few telephone lines to their offices are also forced to bear the cost of having their business interrupted while their fax line is occupied receiving unsolicited fax advertisements. Companies that try to get off of junk fax lists face further productivity losses, as employees spend time calling junk fax senders in an attempt to get removed from junk fax lists.

The Prior Federal Law: Telephone Consumer Protection Act of 1991 (TCPA)
Congress banned junk faxes in 1991 by enacting a federal law to prohibit the transmission of unsolicited advertisements to fax machines [Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227(b)(1)(C)].
Under the 1991 ban, no person or business could transmit an advertisement describing the commercial availability or quality of any property, goods, or services to another person's fax machine without prior express permission or invitation. The 1991 ban gave anyone who received a junk fax the right to sue the sender and the advertiser each for $500 per fax.

SB 833 (BOWEN)

SB 833 mirrors the federal junk fax ban that existed until July 2005: The bill bans junk faxing in the state of California and gives people the right to sue junk faxers for $500 per fax. However, the bill exempts faxes sent from a tax exempt, nonprofit association to its own membership.

Specifically, SB 833:

- Makes it illegal to send unsolicited commercial faxes to or from California or to advertise using unsolicited faxes;
- Allows people and businesses who receive junk faxes to sue the sender or advertiser, or both the sender and the advertiser, for $500 per fax.
- Ensures both the advertiser and the sender are fully liable under the bill (i.e. both "ACME Stock Tips" *and* Fax.com)
- Mirrors the fax identification requirements in federal law (47 CFR 68.318), which require advertisers to identify themselves by name registered with the Secretary of State or other government agency (for non corporations) and print the advertiser's business phone number.

Current California law already ensures California courts have jurisdiction over the sender, even if the sender is out of state and sending into California.

PRIOR LEGISLATION

AB 2944 (Kehoe, Bowen), Chapter 700, Statutes of 2002
AB 2944 repealed California's opt-out junk fax law (previously found in B&P Code § 17538.4). That opt-out law, which was weaker than the federal junk fax ban in the TCPA, was created in 1992 by AB 2438 (Katz), Chapter 564, Statutes of 1992. The opt-out law permitted junk faxing in California and stated specifically that unsolicited fax advertisements could be sent to Californians as long as the sender provided a toll-free number on the fax and honored any request by a recipient to be removed from a fax advertising list.

Legislative records show AB 2438 was passed only for the purpose of protecting Californians during the estimated two-year interim between the passage of the federal ban (TCPA) and the time when FCC regulations implementing the TCPA would become effective. However, because California's opt-out law remained on the books for ten years until AB 2944 repealed it in 2002, junk fax companies used the law to argue in court when sued that 1) the state law is not preempted by the TCPA and 2) the Legislature did not intend for Californians to have a right to sue junk faxers under the federal law. Repealing the weaker California statute helped set the record straight.

SUPPORT

Privacy Rights Clearinghouse
Attorney General Bill Lockyer
Consumer Action
Foundation for Taxpayer and Consumer Rights
CalPIRG
Congress of California Seniors
Carson Chamber of Commerce

Small Businesses

1. Karma Technologies, Inc., Agoura Hills
2. California Safety Training Corporation, Bakersfield
3. California Fetal Alcohol Spectrum Organization, Murrieta
4. Norman Sulker and Associates, Inc., Newport Beach
5. Med-Tox Health Services, Ontario
6. Mendocino Coast Clinics, Inc., Fort Bragg
7. Dorfman Law Office, Mill Valley
8. Add a Cabana, Los Alamitos
9. Law Office of Richard S. Bayer, La Jolla
10. Dauger Research, Inc., Huntington Beach
11. Spiegl Music Publications, Orange
12. JD Designs, Inc., Campbell
13. TEG-Northern California, Inc., Rancho Cordova
14. Tax Related Services, Fremont
15. Advant-Edge, Lancaster
16. The Puppet Gallery, Los Gatos
17. Beeson & Company, Emeryville
18. Delsen & Company LLP, San Diego
19. Lithographic Imagery, Fullerton
20. HealthCare Billing Specialists, La Mirada
21. Well Tempered Productions, Berkeley
22. Frame Surveying & Mapping, Davis
23. Pacific Print Media, San Francisco
24. DMDfund, Encino
25. Wilkas 4 Real Estate, Burlingame
26. Colton Music Center

27. D & C Lighting, Cypress
28. Consumer Law Center, Inc., San Jose
29. CA Loan Brokers, San Diego
30. Norman Suker and Associates, Inc., Newport Beach
31. Cornerstone Financial Strategies
32. Congruent Software, Inc., Berkeley
33. Jerome D. Stark, PC, A Law Corporation, Orange
34. Realty Headquarters, San Diego
35. Heavenly Flowers & Events
36. Chameleon Productions, Castaic
37. Zeliga Management, Forestville
38. LPL Financial Services
39. Vintage Tech
40. Tvalley Judgement Recovery, Temecula
41. Law Offices of James Swiderski, La Jolla
42. Richter Enterprises, Woodland Hills
43. Michael's Custom Jewelry
44. Peter Worsley Studio and Private Gallery, Santa Barbara
45. DCTech LLC, San Francisco
46. Condon Development, San Francisco
47. Slipform Construction, Lancaster
48. Law Offices of Howard Strong, Tarzana
49. RAO Engineers, Hollister

Individuals

1. Rena Sonshine, UCLA Medical Center, Clinical Labs, Microbiology
2. Frank Terrazas, San Diego
3. William Simon
4. Lydia Treadway, realtor, Marin
5. Max Poon, South San Francisco
6. John Hays, West Hollywood
7. Frank L. Treadway, Jr. San Rafael
8. Loralee Johnsgard, San Diego
9. Miles Pritzkat, architect, Redondo Beach
10. John Borden
11. Jim Baskin, San Diego
12. Denise Grant, Manhattan Beach
13. Jimmy A. Sutton, Real Estate Broker and General Contractor, Saratoga
14. Ted Miserek, self-employed, Rancho Santa Margarita
15. Sam Coleman, self-employed, Fountain Valley
16. Dennis Nishi, journalist
17. Al Whaley, Palo Alto
18. Chuck Kennedy, Union City
19. Hans Baumgartner, San Diego
20. Robert J. Zepfel, Newport Beach

21. Brigitta Schumacher-Bradley, UCLA Anderson School of Management
22. Hilleary Burgess, Mendocino
23. Steve Laner, Folsom
24. Richard S. Glassberg, veterinarian, Fullerton
25. Amy Johnsgard, San Diego
26. Catherine Eckert-Conner, Van Nuys
27. Richard Fay, Redondo Beach
28. Brian Austin, San Diego
29. James D. Corey, San Diego
30. Eric Gosch, Hemet
31. Orvin S. Gelber
32. Ray Combs, independent consultant, San Jose
33. Stephen D. Hart, consultant, Nat'l Automatic Sprinkler Industry Promotion, Sacramento
34. Walt Bilofsky, Tiburon

NEUTRAL
Association of California Water Agencies
California Assisted Living Association
Automotive Aftermarket Association
California Association of Collectors
California Association of Homes and Services for the Aging (CAHSA)
California Library Association
Consulting Engineers and Land Surveyors of California (CELSOC)

OPPOSITION
Brawley Chamber of Commerce
California Association for Coordinated Transportation (CalACT)
California Chamber of Commerce
California Department of Consumer Affairs
California Grocers Association
California Lodging Industry Association
California Manufacturers & Technology Association
California Newspaper Publishers Association CNPA Services, Inc.
California Pool and Spa Industry Education Council (SPEC)
California Society of Association Executives (CalSAE)
Chamber of Commerce Mountain View
Engineering & Utility Contractors Association (EUCA)
Greater Fresno Area Chamber of Commerce
Long Beach Area Chamber of Commerce
Newport Beach Chamber of Commerce
Painting and Decorating Contractors of California, Inc.
Palm Desert Chamber of Commerce
Redondo Beach Chamber of Commerce & Visitors Bureau
Redwood City-San Mateo County Chamber of Commerce
Reed Elsevier

Sacramento Metropolitan Chamber of Commerce
South Bay Association of Chambers of Commerce
The Chamber of Commerce of West Covina
Verizon